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JUN 20 1973

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

No. 1550

VINCENT ALO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

Supplementary Brief 1

Cases

Barker v. Wingo, 407 U.S. 514 (1972) 2

Dickey v. Florida, 398 U.S. 30, 37-38 (1970) 3

Strunk v. United States, No. 72-5521 (U.S. Sup.Ct., June 11, 1973) 2

United States v. Strunk, 467 F.2d 969 (uth Cir. 1972) 2

Other Authorities

Federal Criminal Rule 20 2

Rule 24(5) (Supreme Court) 2

United States Constitution, Sixth Amendment 2

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SUPPLEMENTAL BRIEF

Pursuant to Rule 24(5) of this Court, petitioner submits this supplemental brief. On June 11, 1973, this Court decided *Strunk v. United States*, No. 72-5521, which adds further basis for petitioner's prayer to this Court for relief from the deprivation of his constitutional right to a speedy trial.

The facts in *Strunk* are, of course, well known to this Court. They involve the post-indictment delay of a federal criminal case of 259 days, less than nine months, between indictment and arraignment. The defendant in that case, freely admitting that the delay had no prejudicial effect on the preparation of his defense, contended that the delay nonetheless violated the Sixth Amendment to the Constitution. That claim, denied in the District Court, was upheld by the Court of Appeals for the Seventh Circuit. *United States v. Strunk*, 467 F.2d 969 (7th Cir. 1972). Chief Judge Swygert, writing for a unanimous court, said that the delay was unusual and critical and "calls for explanation as well as justification." *Id.* at 972. The explanations offered, understaffing of the office of the U.S. Attorney and deferment for possible proceedings under Federal Criminal Rule 20, were not accepted by the court. Employing the multi-factor approach promulgated by this Court in *Barker v. Wingo*, 407 U.S. 514 (1972), the court of appeals held that the absence of prejudice in the preparation of the defense did not prevent the conclusion that the right to a speedy trial had been denied to the defendant. The defendant's argument that he had been prejudiced in losing the possibility of serving his federal sentence concurrently with a prior state sentence was found unpersuasive, the court of appeals noting that the federal sentence could always be made to commence at the conclusion of the state sentence, no matter how promptly the federal trial

had been held.

The *Strunk* decision at the court of appeals level is, on this ground, directly in conflict with the decision of the Second Circuit in this case. The Second Circuit position that prejudice, demonstrable and proven by the defendant, is a necessary condition to the establishment of a claim to denial of speedy trial, is controverted by the Seventh Circuit ruling. The latter court, following more carefully and properly this Court's guidance in *Barker*, treats the question of prejudice as one of the factors to be weighed, not a conclusive factor. That court said: "After balancing the various factors outlined in *Wingo*, we conclude that the defendant was denied a speedy trial to his prejudice." 467 F.2d at 973.

This Court's decision, also unanimous through an opinion by the Chief Justice, upholds the decision by the court of appeals on the conclusion that a constitutional deprivation had occurred by the 259 days of delay. The Court was guided in part by the action of the Department of Justice, which failed to seek formal review of the court of appeals' decision, thereby acquiescing in the ruling as to denial of speedy trial. Plainly not content to let a matter of constitutional significance pass without evaluation, this Court also commented upon the merits of the speedy trial decision and concluded that the court of appeals had been correct. This Court reasserted that unintentional delays caused by overcrowded courts or understaffed prosecutors are to be weighed less heavily than intentional delays. The Court underscored its previous declaration in *Dickey v. Florida*, 398 U.S. 30, 37-38 (1970):

> ". . . the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to

provide a prompt trial."

The Court said that even the situations in which the accused has little or no interest in being tried quickly are subject to the constitutional strictures:

> "The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, command prompt disposition of criminal charges." (Note 2).

The views announced by this Court in *Strunk* are challenged by the position of the Government and the courts below in this case. The delay here, post-indictment, was an extraordinary three years, not the relatively brief 259 days that the Seventh Circuit found unusual and critical in *Strunk*. The explanations proferred by the Government in *Strunk*, while not acceptable to the court of appeals or this Court, were not unworthy and discreditable. In this case, there was intentional delay for reasons that were "condemned," an effort conceded by the Government to cover up illegal electronic surveillance of an attorney's office in 1963. The strategy for the cover up is now revealed in a 1968 memorandum of the Department of Justice, which implicates particularly former United States Attorney Morgenthau who "expressed great concern over the disclosure . . . because he did not want to spread on the record that the Department had engaged in electronic surveillance of a member of the bar." (Petition, App. C, p. 5). This Court and the court of appeals in *Strunk* declared that the delays there called for explanation as well as justification. To this date the Government has offered no acceptable explanation and no justification for its conduct in this case. Rather the Government has vehemently resisted petitioner's efforts, since the beginning

of the prosecution, to bring the facts to light. The embarrassment of the Government leads Government counsel to seek to obfuscate and create false issues. This Court, we submit, ought to call upon the Government to account.

The Seventh Circuit in *Strunk* explored new constitutional territory in trying to fashion relief for the deprivation of speedy trial. The court's imaginative effort was to decree that the defendant should receive credit on his sentence for the 259 days of impermissible delay in bringing the indictment to trial. This Court rejected that equitable principle of relief. The Court held that, where the Constitution has been violated in this respect, dismissal of the indictment is the only possible remedy. Unfortunately, in petitioner's case, dismissal of the indictment offers the most partial relief. Petitioner has been imprisoned on this indictment since October 1970. There are only a few months remaining on his sentence. The severe remedy that this Court ruled as the only permissible remedy for denial of a speedy trial cannot be effectuated in this case. Nonetheless, petitioner presses with undiminished vigor for the vindication of his Sixth Amendment right to a speedy trial.

Petitioner respectfully submits that this Court's action in *Strunk v. United States* adds significantly to the arguments for granting the writ of certiorari in this case. The public interest in a broad sense, to use this Court's phrase, requires that the Government be held responsible for its intentional and discreditable decisions to deprive persons of their rights under the Constitution. No prior case provides the clarity of facts exhibiting this form of prosecutorial manipulation of the timing of the criminal process. Ten years ago, the Government planted an illegal bug in a lawyer's office. The ramifications of that in denying petitioner the right to a speedy trial have yet to be

fully explored. Petitioner respectfully urges that this Court grant this petition for review.

Respectfully submitted,

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